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**In the Supreme Court of the United States**

OCTOBER TERM 1984

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STATE OF MONTANA, ET AL., PETITIONERS  
v.  
BLACKFEET TRIBE OF INDIANS

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE  
IN SUPPORT OF THE RESPONDENT

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### **QUESTION PRESENTED**

Whether the State of Montana may tax the Blackfeet Tribe's royalty interest under oil and gas leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a-396g.

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SUPPORTING RESPONDENT

## INTEREST OF THE UNITED STATES

The United States has an interest in this case arising from its special relationship with the Indian tribes. *United States v. Klamath Indians*, 304 U.S. 119, 123 (1938). In addition, the Court's decision concerning a State's power to tax the royalty income of an Indian Tribe under leases issued pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347 *et seq.*, will have a direct bearing on the achievement of the purposes of that Act and the congressional goals of self-government and economic self-sufficiency embodied in the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984 *et seq.*, and more recent legislation, such as the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.* See, *e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 & n.10 (1980).

## STATEMENT

### A. The Leasing Statutes

This case concerns the authority of the State of Montana to impose taxes on the royalty interest of respondent Blackfeet Tribe of Indians under leases for the production of oil and gas on unallotted lands on the Tribe's Reservation. The leases were issued pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. 396a *et seq.* The 1938 Act does not contain a statutory authorization to tax leases issued under that Act. The State instead relies on a 1924 statute that permitted the Secretary of the Interior to lease unallotted lands for mining purposes; that Act contained a proviso that expressly authorized the States to tax both the lessee's interest in oil and gas production and the Tribe's royalty interest. Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. 398 *et seq.*

The 1924 Act applied to unallotted land on Indian reservations (other than lands of the Five Civilized Tribes and the Osage Reservation in Oklahoma) that were "subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 [26 Stat. 795]." The 1891 Act mentioned in the 1924 Act was an amendment to the General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. 331 *et seq.*, which had been passed only four years earlier. The proviso to Section 3 of the 1891 Act, now codified at 25 U.S.C. 397, states that "[w]here lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments," they may be leased, by authority of the tribal council, for a period of up to 5 years for grazing purposes or 10 years for mining purposes, subject to approval by the Secretary of the Interior.

In *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159, 161-163 (1936), the Court held that the 1891 Act and the 1924 amendment thereto applied to land in reservations created by treaty or statute, but the Court indicated that those Acts did not apply to reservations created by Executive Order. Indeed, in 1927, Congress had enacted a separate statute permitting the leasing

of unallotted lands on Executive Order reservations for oil and gas mining purposes, with the consent of the Tribe concerned, in accordance with the provisions of the 1924 Act. The 1927 Act also expressly authorized state taxation of the lessee's income and property as well as rentals, bonuses, and royalties received by the lessor Tribe. Act of Mar. 3, 1927, ch. 299, §§ 1, 3, 44 Stat. 1347, 25 U.S.C. 398a, 398c. A prior statute passed in 1919 had permitted the Secretary of the Interior, even without the consent of the Tribe concerned, to lease unallotted lands on Executive Order and other reservations in specified western States, in the same manner as lands are leased on the public domain, for gold, silver, copper and other minerals except oil and gas. Act of June 30, 1919, ch. 4, § 26, 41 Stat. 31, 25 U.S.C. 399. The 1919 Act expressly stated that it did not affect the right of a State or locality to levy and collect taxes "upon improvements, output of mines, or other rights, property, or assets of any *lessee*" (§ 26, 41 Stat. 33 (emphasis added)) but it did not permit taxation of the lessor tribe's royalty income or other interests.

### B. The Proceedings In This Case

1. Respondent Blackfeet Tribe filed this suit in the United States District Court for the District of Montana challenging the application of several Montana taxes to the Tribe's royalty interest in oil and gas produced on unallotted lands on the Tribe's reservation under leases issued pursuant to the 1938 Act (Pet. App. 131-149).<sup>1</sup> The Tribe is

<sup>1</sup> The taxes imposed are: (A) the Oil and Gas Severance Tax, Mont. Code Ann. §§ 15-36-101 *et seq.* (1983) (Pet. App. 195-205) (imposed at a rate of 5% or 6% of the gross value of oil and 2.65% of the gross value of gas produced, excluding royalty or other interests owned by the federal, state, county or municipal government (*id.* § 15-36-101(1)(a), (b) and (3)), to be distributed to the local government block grant fund, county governments, and the state general fund (*id.* § 15-36-112)); (B) the Oil and Gas Net Proceeds Tax, Mont. Code Ann. §§ 15-23-601 *et seq.* (1983) (Pet. App. 181-194) (imposed at a rate fixed by the county board of commissioners (*id.* § 15-23-607), but apparently excluding any royalty interests owned by the federal and state governments (*id.* §§ 15-23-605, 15-1-102), and paid to the County Treasurer (*id.* § 15-23-607)); (C) the Oil and Gas Conservation Tax, Mont. Code Ann. §§ 82-11-101 *et seq.* (1983) (Pet. App. 215-221) (imposed at a rate of

organized under the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, and is the beneficial owner of oil and gas that lies beneath its Reservation (Pet. App. 104-105). The state taxes assessed against the Tribe's royalty interest have been paid by the lessees, who then deduct the Tribe's share of the taxes from their royalty payments (*id.* at 3, 106-107, 142-145, 249-257; Pet. Br. 8-9).

The district court sustained the application of the state taxes to the Tribe's royalty interest and granted summary judgment in favor of the State (Pet. App. 103-130). The court acknowledged that the 1938 Act was intended to be a comprehensive leasing statute that "addressed nearly every subject concerning the leasing of Indian lands for mining purposes" (*id.* at 118) and that neither the text nor legislative history of the 1938 Act addressed the question of state taxation (*id.* at 119). However, the district court concluded that the state taxes are authorized by the 1924 Act (*id.* at 114). Viewing the question presented to be whether the taxing proviso to the 1924 Act had been "repealed" by the 1938 Act, the Court concluded that the silence in the text and legislative history of the 1938 Act was not sufficient to establish such a repeal (*id.* at 114-120, 125-129). The district court also relied upon what it believed was a longstanding administrative interpretation that such taxes are valid (*id.* at 120-125).

2. A panel of the court of appeals affirmed the judgment of the district court (Pet. App. 70-102), but on rehearing, the court, sitting en banc, reversed and remanded for further proceedings (*id.* at 1-69). The court of appeals rejected the Tribe's contention that the 1938 Act entirely repealed the consent to tax contained in the proviso to the 1924 Act, and the court therefore held that the 1924 Act's taxing authority remained in effect for leases issued under that earlier Act (*id.* at 33-36). However, the court concluded

.2% of market value (*id.* § 82-11-131) for the purpose of defraying the expenses of the State's oil and gas conservation board); and (D) the Resource Indemnity Trust Tax, Mont. Code. Ann. §§ 15-38-101 *et seq.* (1983) (Pet. App. 206-214) (imposed at a rate of ½% of the gross value of the production (*id.* § 15-38-104) to support a state trust fund that is established for environmental purposes (*id.* §§ 15-38-201 to 15-38-203)).

that the 1924 Act's taxing proviso was not incorporated by implication into the 1938 Act and that it therefore does not apply to leases issued pursuant to that Act (*id.* at 37-51).

The court explained that, as all parties conceded, Congress intended the 1938 Act to supersede the prior leasing statutes and that in enacting it, "Congress manifested an unmistakable intention to subject subsequent leases to the terms of the new statute rather than its predecessors" (Pet. App. 43). Against this background, the court could not infer that "Congress nonetheless intended that a portion of one of the predecessor statutes control a lease issued under the 1938 Act," especially in view of the absence of any indication of such an intent in the text, legislative history, or context of the 1938 Act (*id.* at 43-44). To do so, the court reasoned, would be inconsistent with this Court's holding in *Bryan v. Itasca County*, 426 U.S. 373, 393 (1976), that congressional consent to state taxation of Indian income from on-reservation activities must be clear (Pet. App. 44-45).

The court of appeals also did not believe that several informal administrative opinions by the Department of the Interior required a contrary conclusion. The court noted that a 1943 opinion by Solicitor Harper (58 Interior Dec. 535; Pet. App. 232-248) concerned leases issued pursuant to the 1891 and 1924 Acts, and therefore did not present the question of the application of the 1924 Act taxing authorization to leases under the 1938 Act (Pet. App. 4 n.1). The first occasion on which the Department considered that question was in a brief opinion written in 1956 by the Associate Solicitor (Pet. App. 262-266). The court found that the authority of that interpretation was undermined because it was adopted informally and without any analysis of whether Congress actually intended the taxing authority in the 1924 Act to apply to leases issued pursuant to the 1938 Act. In addition, the court noted that the Department formally repudiated that position in 1977 (84 Interior Dec. 905) "in a published and carefully reasoned opinion that analyzed both statutes and the Department's prior rulings" (Pet. App. 47) and that "[i]n 1979, the Department reexamined and adhered to its 1977 position" (*ibid.*, citing 86 Interior

Dec. 181 (1979)). "Under these circumstances," the court concluded, "confronted with two non-contemporaneous interpretations of the 1938 Act, we do not believe that we should defer to the informal, unpublished one merely because it is of earlier vintage" (*ibid.*).

Finally, the court of appeals stressed that "the 1924 Act was an integral part of Congress's allotment program, under which all Indian land was intended to become subject to state taxation after the expiration of a brief trust period" (Pet. App. 48). In the court's view, the consent to tax in the 1924 Act was in harmony with the purposes of allotment. However, the court explained that the 1938 Act replaced prior mineral leasing statutes with a scheme calculated to advance the policies of the Indian Reorganization Act of fostering tribal sovereignty and economic growth, prohibiting further allotments, and extending indefinitely the trust and tax exempt status of previously allotted lands (Pet. App. 18-32, 48-49). The court "fail[ed] to see how interpreting the 1938 Act to incorporate implicitly the portion of the 1924 Act consenting to state taxation would advance [these] purposes of the 1938 Act" (*id.* at 49).

Judge Anderson dissented, joined by Judges Wallace and Kennedy (Pet. App. 52-69).

#### INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Montana in this case seeks to tax the royalty interest of the Blackfeet Tribe in the production of oil and gas on the unallotted lands of the Tribe's Reservation. The imposition of a state tax on the income received by a Tribe from the resources held by the United States in trust for the Tribe constitutes a direct and substantial intrusion by the State into the realm of Indian affairs that ordinarily is reserved exclusively to the Tribe itself or to the Federal Government as its guardian. This is all the more so where, as here, the tax is imposed on the disposition of a depletable resource that represents a significant part of the value of the Reservation that the United States has set aside for the Tribe. A Tribe's income from the disposition of its resources through leasing activities is often used to maintain the tribal government and to furnish essential

governmental and other services to tribal members. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 138 (1980); cf. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-141 (1982). The State's tax therefore also directly infringes upon the sovereignty of the Tribe in a way that ordinarily is unthinkable in the relations between sovereigns. Compare *Bryan v. Itasca County*, 426 U.S. at 388-389.

Against this background, only the clearest manifestation of congressional consent to state taxation would support the imposition of the taxes at issue here. *Bryan v. Itasca County*, 426 U.S. at 392-393. But in this case, as the State concedes, there is no indication whatever in the text or legislative history of the 1938 Act of an intent to permit state taxation of tribal income from oil and gas or other mineral leases issued under that Act. Far less is there the requisite clear and unambiguous expression of congressional consent to such taxation.

The State relies on a taxing proviso to an earlier statute—the 1924 amendment to the 1891 Act permitting the leasing of unallotted lands on treaty and statutory reservations—as authorization for the taxes. However, because the 1938 Act was comprehensive in its scope and superseded then-existing statutes with regard to future mineral leasing of unallotted lands, there is no basis for inferring from mere silence in 1938 that Congress intended implicitly to carry forward the prior taxing authority. To the contrary, when Congress wished to incorporate features of prior leasing schemes into the new regime, it expressly did so. But Congress omitted the taxing proviso.

Moreover, the provisions of the superseded statutes that authorized state taxation of tribal income under mineral leases were themselves departures from the general rule barring state taxation of restricted Indian interests, and they were enacted as part of the allotment policy, which anticipated the eventual sale to non-Indians of the unallotted reservation lands and the dissolution of tribal governments. By contrast, mineral production on *allotted* lands—those specifically designated for retention by the Indians—was never permitted, except in the case of the Five Civilized

Tribes and other Oklahoma Indians, where Congress specifically found that special circumstances warranted the imposition of state taxes. The allotment policy was ended in 1934 by the Indian Reorganization Act (IRA), which made clear that unallotted lands would remain with the Tribe and simultaneously sought to strengthen the Tribes as sovereign entities, not to dissolve them.

In light of the intervening reversal of national policy in the IRA, it is not in the least surprising that Congress chose not to include in the 1938 Act an authorization for the States to tax the Tribes' income under leases of unallotted lands issued pursuant to that Act; indeed, one of the principal purposes of the 1938 Act was to conform mineral leasing of unallotted reservation lands to the policies of the IRA.

**A. STATE TAXATION OF INDIAN PROPERTY AND INCOME IS PERMISSIBLE ONLY WITH EXPRESS CONGRESSIONAL AUTHORIZATION, AND CONGRESS HAS RARELY GIVEN ITS CONSENT AND ORDINARILY HAS DONE SO ONLY WHERE SPECIAL FACTORS WARRANTED**

The State does not appear to challenge the firmly established propositions that a State may tax reservation property or income of a Tribe or individual Indian only if it is clearly authorized by Congress to do so and that ambiguous language is not sufficient to deprive Indians of their historic immunity from such taxation. See, e.g., *Bryan v. Itasca County*, 426 U.S. at 392-393. Moreover, as this Court has stated with regard to the very issue presented in this case—whether Indian royalty income under oil and gas leases is subject to state taxation—“[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.” *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

Although the State does not challenge the correctness of these principles, an appreciation of their firm foundation in the Constitution, laws, and experience of the Nation is nevertheless important to the proper resolution of this case. This is so because an exploration of the manner in which Congress and this Court have addressed the question of

state taxation of Indian property and income reveals that the taxing proviso to the 1924 Act upon which the State rests its entire argument in this case was itself such a striking aberration that it would be particularly inappropriate to infer that Congress intended the consent to state taxes in the proviso to be carried forward and applied to leases issued pursuant to the superseding leasing Act passed by Congress in 1938.

1. “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *Rice v. Olson*, 324 U.S. 786, 789 (1945). This policy is embodied in the Constitution itself, which grants Congress alone the power “[t]o regulate Commerce \* \* \* with the Indian Tribes,” just as it confers on Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States.” U.S. Const. Art. I, § 8, Cl. 3. As this Court recognized in its earliest Indian cases, the Indian Commerce Clause was the product of a deliberate repudiation by the Framers of the ambiguous and divided authority over Indian affairs that existed under Article IX of the Articles of Confederation, which granted Congress “the sole and exclusive right and power \* \* \* of regulating the trade and managing all affairs with the Indians,” but exempted Indians who were “members of any of the States” and preserved “the legislative right of any State within its own limits.” See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-561 (1832); *id.* at 590-592, 594 (McLean, J., concurring). See also *The Federalist* No. 42, at 284 (J. Madison) (J. Cooke ed. 1961); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876).<sup>2</sup> Against this background, the Court in *Worcester v. Georgia* held that “[t]he Cherokee nation \* \* \* is a distinct community occupying

<sup>2</sup> So, too, the Constitution confers on the President, by and with the advice and consent of the Senate, the power to make treaties (Art. II, § 2, Cl. 2), including those with Indian nations (see *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 559-560), and declares such treaties to be “the supreme Law of the Land” (Art. VI, Cl. 2). At the same time, the Constitution prohibits the States from entering into any treaty (Art. I, § 10, Cl. 1).

its own territory, with boundaries accurately described, in which the laws of Georgia can have no force" (31 U.S. (6 Pet.) at 561). Only recently, the Court again recognized that the Indian Commerce Clause is "a shield to protect Indian tribes from state and local interference" (*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-154 (1982)).

To be sure, the rigid rule of *Worcester v. Georgia* has been modified over the years to permit the application of state law in some circumstances "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Williams v. Lee*, 358 U.S. 217, 219-220 (1959). Thus, where a State seeks to regulate the conduct of non-Indians on a reservation, the Court has engaged in a more particularized inquiry into the nature of the state, federal, and tribal interests at stake, in order to determine whether the exercise of state authority is preempted by federal law or would impermissibly infringe "on the right of reservation Indians to make their own laws and be ruled by them" (*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 145 (1980), quoting *Williams v. Lee*, 358 U.S. at 220). See also *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 837-838 (1982). But at the same time, the Court has stressed that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker* 448 U.S. at 144.

2. Although *Worcester v. Georgia* specifically concerned the extension of state criminal jurisdiction onto Indian lands, "the rationale of the case plainly extended to state taxation within the reservation as well." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 169 (1973). Indeed exemption from taxation has long been regarded as one of the principal features of the distinct character of Indian tribes within their own territory. This principle too is reflected in the Constitution, which excludes "Indians not taxed" from the enumeration upon which the apportionment of Representatives and direct taxes is based. U.S. Const. Art. I, § 2, Cl. 3; *id.* Amend. XIV.

Accordingly, in *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1866), the Court held that the lands held by Indians in common as well as the lands held in severalty were exempt from state taxation. The Court explained that "[i]f the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' \* \* \* separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority." *Id.* at 755; see also *id.* at 758-759, 760-761. The Court likewise invalidated state taxes imposed on Indian reservation land in *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866), terming the taxes and related provisions an "extraordinary" and "illegal" exercise of state power and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Id.* at 766, 770, 771.

Consistent with these principles, the Enabling Act under which Montana was admitted to the Union required the State to disclaim any right and title to lands owned or held by an Indian Tribe, which "shall remain under the absolute jurisdiction and control of the Congress of the United States." Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 677. The Act further provided that no taxes could be imposed on lands belonging to the United States, and permits the State, absent congressional consent, to tax Indian land only if it is owned or held by an Indian "who has severed his tribal relations," and even then not to the extent the land was granted to the Indian under a law exempting the land from taxation. *Ibid.* Compare *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 175-176 (1973). These same principles also were implemented in the General Allotment Act of 1887, which provided for allotted lands to be retained in trust status for a specified period in order to ensure that they would be exempt from state taxation. See *United States v. Rickert*, 188 U.S. 432, 435-438 (1903); *United States v. Mitchell*, 445 U.S. 535, 543-544 (1980).

This Court has never waived from the teachings of *The Kansas Indians* and *The New York Indians* as regards

state taxation of Indian lands, whether tribally owned or held in severalty, where the Tribe remains as a distinct entity. See, e.g., *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 602-603 (1943); *McClanahan*, 411 U.S. at 169. Nor has Congress abandoned this general rule of exemption from state taxation, even where it has otherwise consented to the exercise of state jurisdiction. See, e.g., 28 U.S.C. 1360(b) (discussed in *Bryan v. Itasca County*, 426 U.S. at 378, 390-392).

The foregoing principles of course not only bar state taxation of the land itself; they also bar state taxation of income realized by the Tribe or individual Indians from the land. For example, in *Thomas v. Gay*, 169 U.S. 264 (1898), which sustained the application of a tax by the Territory of Oklahoma to non-Indian owned cattle grazing on unallotted land under leases issued pursuant to the 1891 leasing act, the Court emphasized that the taxes were not imposed on the rents received by the Indians. 169 U.S. at 275. Moreover, the Court has repeatedly stressed in recent years that "in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n*, *supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-476 (1976); *Bryan v. Itasca County*, 426 U.S. at 375-378, 392-393. See also *Squire v. Capoeman*, 351 U.S. 1, 9 (1956).

3. Congress has only rarely given the requisite express consent to a State to tax income received by Indians from their land, and in general it has done so only on a particularized basis after weighing the circumstances involved. No such general consent has ever been given with regard to *allotted* lands that are held in trust or restricted status. For example, the statutes authorizing the leasing of allotted lands for oil and gas or other mining or for farming and

grazing purposes do not permit such taxation. Act of Mar. 3, 1909, ch. 263, 35 Stat. 783, 25 U.S.C. 396; Act of Mar. 3, 1921, ch. 119, § 1, 41 Stat. 1232, 25 U.S.C. 393. Nor does the statute permitting the sale of timber from allotted lands (Act of June 25, 1910, ch. 431, § 8, 36 Stat. 857, 25 U.S.C. 406), and in *Squire v. Capoeman*, *supra*, the Court held that income from the sale of timber on a restricted allotment was not subject even to federal taxation. 351 U.S. at 7-9. The Court there explained that the Indian's "timber constitutes the major value of his allotted land" and that "[o]nce logged off, the land is of little value." The Court accordingly concluded that the allotment would not serve the congressional purpose of bringing the Indian to a state of competency and independence unless the entire proceeds of the sale of its timber were preserved for him. *Id.* at 10.<sup>3</sup>

There likewise is no general authorization for the taxation of income from *unallotted* lands. Although the 1924 Act permitted the taxation of tribal income from leasing of lands subject to the 1891 Act for mining purposes, income from leasing of such lands for grazing purposes under the 1891 Act was never made subject to state taxation. Cf. *Thomas v. Gay*, 169 U.S. at 272. See also 25 U.S.C. 402, 402a (permitting leasing of surplus land and unallotted irrigable land for farming, but with no authorization of state taxation). Similarly, the sale of timber from unallotted lands for the benefit of the Tribe—activity that involves exploitation of the principal resource of Indian Tribes other than minerals—is not made subject to state taxation. See Act of June 7, 1910, ch. 7, § 7, 36 Stat. 857, 25 U.S.C. 407. Indeed, in *White Mountain Apache Tribe v. Bracker*, *supra*, the Court held that the State of Arizona could not impose a motor carrier license tax or fuel use tax on a *non-Indian* company that harvested timber on unallotted land under this statute. The Court observed, *inter alia*, that such taxes "would threaten the overriding federal objective

<sup>3</sup> The Court distinguished *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935), on the ground that it permitted federal taxation of income derived from the investment of *surplus* income from land, or "reinvestment income," not the "trust" itself or "income derived directly therefrom." 351 U.S. at 9.

of guaranteeing Indians that they will 'receive \* \* \* the benefit of whatever profit [the forest] is capable of yielding' " (448 U.S. at 149, quoting 25 C.F.R. 141.3(a)(3) (1979) (brackets added by the Court)) and would thereby undermine "the general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs' " (448 U.S. at 149, quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. at 151). The Court noted in this regard that timber operations accounted for more than 90% of the Tribe's annual profits, which were virtually the only source of funding for the Tribe's governmental programs (*id.* at 138).<sup>4</sup>

Against this background, any congressional authorization of state taxation of a Tribe's or individual Indian's income from trust lands would constitute a significant departure from the established congressional policy of preserving Indian resources free from state interference. Such departures appear to have occurred almost exclusively with regard to income from mineral resources, and even there Congress typically acted on a case-by-case basis in light of special circumstances pertaining to the Oklahoma Indians, who were rich in mineral resources. The proviso to the 1924 Act, upon which the State relies, and its 1927 counterpart for Executive Order reservations, are the only exceptions to this cautious approach by Congress. And they were radical exceptions, because they were not dependent upon any assessment of the relative interests and circumstances of the Indians and the State. It is entirely understandable that Congress soon abandoned that broad authorization of state taxes.

The first statutory authorizations for the States to tax Indian income from trust property appear to have been enacted in 1921<sup>5</sup> with respect to oil and gas royalties received

<sup>4</sup> Cf. *New Mexico v. Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip op. 12 ("when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose").

<sup>5</sup> The 1919 leasing Act permitted taxation only of the lessee's interest, not the lessor Tribe's income. See page 3, *supra*.

by the Osage Tribe<sup>6</sup> and income from restricted allotments granted to certain specified individual Quapaw Indians in Oklahoma.<sup>7</sup> Subsequent statutes were enacted in 1924 and 1928, respectively, permitting taxation of the production of oil and gas and other minerals on certain unallotted lands of the Kaw Reservation in Oklahoma<sup>8</sup> and the restricted allotted lands of members of the Five Civilized Tribes of Oklahoma.<sup>9</sup> But as this Court has observed, these four special statutes affecting only Oklahoma were "occasioned by the favorable economic position of the particular Indians." *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 366-367 (1949). For example, the Court noted in *Oklahoma Tax Commission v. United States*, *supra*, that the oil and gas receipts of the Five Civilized Tribes from 1904 to 1937 were in excess of \$100 million and those of the Osage Tribe for the same period were in excess of \$261 million. 319 U.S. at 608-609 n.13.

Other factors were at work in Oklahoma as well. As a result of the policy of the Curtis Act,<sup>10</sup> the lands of the Five Civilized Tribes were divided among the members of the Tribes in severalty and the tribal governments effectively dissolved. See generally Felix S. Cohen, *Handbook of Federal Indian Law* 427-445 (1942). Thus, as this Court later observed, the principles underlying the Court's prior decisions concerning exemption of Indians from state tax and other laws "[did] not fit the situation of the Oklahoma Indians. Although there [were] remnants of the form of tribal sovereignty, those Indians [had] no effective tribal autonomy as in *Worcester v. Georgia*, *supra*; and, unlike the Indians involved in *The Kansas Indians* case, *supra*, they [were] actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Oklahoma Tax Commission v. United States*, 319 U.S. at

<sup>6</sup> Act of Mar. 3, 1921, ch. 120, § 5, 41 Stat. 1250-1251.

<sup>7</sup> Act of Mar. 3, 1921, ch. 119, § 26, 41 Stat. 1248-1249.

<sup>8</sup> Act of May 27, 1924, ch. 199, 43 Stat. 176-177, 25 U.S.C. 401.

<sup>9</sup> Act of May 10, 1928, ch. 517, § 3, 45 Stat. 496.

<sup>10</sup> Act of June 28, 1898, ch. 517, 30 Stat. 495 *et seq.*

603.<sup>11</sup> In addition, the Court observed that the State of Oklahoma supplied the Indians with "schools, roads, courts, police protection and all the other benefits of an ordered society." *Id.* at 609.<sup>12</sup>

It also appears that in each instance Congress consented to the application of the Oklahoma tax as a condition to granting an extension of the period during which the property involved would remain in restricted status. For example, the Act of June 28, 1906, ch. 3572, § 3, 34 Stat. 543, which provided for allotment of lands of the Osage Tribe among its members, had reserved to the Tribe itself for 25 years the interest in the substantial oil, gas, coal and other mineral rights in those lands, in order that all members would share in them equally. See *McCurdy v. United States*, 246 U.S. 263, 265-266 (1918); S. Rep. 704, 66th Cong., 3d Sess. 1 (1921). The members of the Tribe in 1921 sought an extension of that 25-year period to enable the members to share equally in all remaining production. However, that extension would have resulted in the loss of substantial revenue to the State and Osage County, and Congress therefore provided for the imposition of the State's gross production tax on the taking of oil and gas. As this Court later observed, Congress was influenced by its knowledge that under Oklahoma law, one-third of the proceeds would be returned to Osage County and thereby directly benefit the Indians, and Congress specified that the taxes on Osage oil and gas must continue to be distributed in that manner. Act of Mar. 3, 1921, ch. 120, § 5, 41 Stat. 1251. See *Oklahoma v. Barnsdall Refineries, Inc.*, 296

<sup>11</sup> The Court in *McClanahan* explained the result in *Oklahoma Tax Commission v. United States* as involving a situation "where Indians have left the reservation and become assimilated into the general community." 411 U.S. at 171.

<sup>12</sup> Despite the force of these special factors, four Justices, in an opinion by Justice Murphy, dissented from the Court's holding permitting the application of Oklahoma's estate tax to restricted property of deceased Indians of the Five Civilized Tribes. 319 U.S. at 612-624. That dissenting opinion was cited with approval by the Court in *Bryan v. Itasca County*, 426 U.S. at 392.

U.S. 521, 524-525 (1936).<sup>13</sup> The legislative history also shows that the bill was favored by the Osage Indians themselves (S. Rep. 704, *supra*, at 2) and that its taxing provision was affirmatively endorsed by the Secretary of the Interior (*id.* at 5).

The Quapaw Indians also agreed to the imposition of state taxes on oil and gas production in 1921 as a condition to extending the 25-year period of restrictions under their original allotments.<sup>14</sup> And they consented again in 1937 to Congress's enactment of a more limited gross production tax on the mining of zinc and lead on their allotments,<sup>15</sup> in order to prevent any suggestion that other types of state taxes not anticipated in 1921 might be imposed by Oklahoma.<sup>16</sup>

The proviso to the 1924 Act upon which the State relies here, which permitted state taxation of the Tribe's royalty interest in leases of unallotted lands on all reservations subject to the 1891 Act, was expressly patterned after the narrow statutes pertaining to the Osage Tribe and Quapaw allottees, with the view that if other States adopted similar taxes, "the gross production tax should go to the upbuilding of the State." See 65 Cong. Rec. 6844 (1924) (remarks of Rep. Hastings). The sparse legislative history of the 1924 Act does not, however, suggest that Congress determined in connection with its passage that the varied circumstances of other Indian tribes in other States were similar to those of the Oklahoma Indians that had been thought to warrant creating an exception to the usual rule exempting tribal income from state taxes. Moreover, the doubtful wisdom of extrapolating from the experience of the Oklahoma

<sup>13</sup> In *Barnsdall*, the court held that because Congress consented only to a gross production tax similar to that permitted under Oklahoma law in 1921, the 1921 Act of Congress did not permit Oklahoma to impose a tax at a flat rate per barrel to defray the expenses of administering the State's oil and gas proration law. 296 U.S. at 525-526.

<sup>14</sup> See *Production Tax Upon Lead and Zinc on Quapaw Indian Lands in the State of Oklahoma: Hearing on H.R. 5559 Before the House Comm. on Indian Affairs, 75th Cong., 1st Sess. 4, 7 (1937) (Quapaw Hearing)*.

<sup>15</sup> See Act of Apr. 17, 1937, ch. 109, 50 Stat. 68 *et seq.*

<sup>16</sup> See *Quapaw Hearing*, *supra* note 14.

Indians to Tribes elsewhere is suggested by the fact that although the Secretary of the Interior had affirmatively endorsed the taxing provisions of the Oklahoma bills,<sup>17</sup> he stated only that his Department would "offer no objection" to including a tax on the royalty interest of the Tribes affected by the 1924 Act. H.R. Rep. 386, 68th Cong., 1st Sess. 2 (1924); S. Rep. 546, 68th Cong., 1st Sess. 2 (1924). See Pet. App. 327, 331.

The casual manner in which Congress in 1924 enacted the broad authority for the States generally to tax tribal income from their trust resources was thus a marked departure, both in form and context, from the manner in which Congress approached the issue in the special cases of the Osage and Quapaw Indians and the subsequent Oklahoma statutes and from the caution Congress ordinarily has exhibited in this area. Needless to say, we should not lightly attribute to Congress an intent to accomplish the same result in the 1938 Act in an even more casual manner—that is, by mere silence. Between the time of Congress's enactment of the taxing proviso in 1924 and its enactment in 1938 of a new leasing statute that did not contain a taxing proviso, Congress thoroughly studied the plight of Indian Tribes elsewhere in the Nation, especially in connection with its consideration of the Indian Reorganization Act. Thus, by 1938, Congress fully appreciated that the circumstances of other Tribes were quite unlike those that had called for special exceptions permitting state taxation in Oklahoma. Instead of abolishing other Tribes and their reservations, as it had done in Oklahoma, Congress in the IRA sought to revitalize Tribes and fully restore their reservations to federally protected status.

<sup>17</sup> See H.R. Rep. 1193, 70th Cong., 1st Sess. 5 (1928) (tax pertaining to allottees of the Five Civilized Tribes is "not only fair and just to the State of Oklahoma, but to the Indians as well"); S. Rep. 982, 70th Cong., 1st Sess. 5 (1928) (same); S. Rep. 433, 68th Cong., 1st Sess. 3 (1924) (Secretary's letter proposing taxing provision applicable to the unallotted lands of the Kaw Tribe).

**B. THE TEXT, LEGISLATIVE HISTORY, AND BACKGROUND OF THE 1938 ACT DO NOT SUGGEST THAT CONGRESS INTENDED TRIBAL ROYALTIES RECEIVED UNDER LEASES ISSUED PURSUANT TO THAT ACT TO BE SUBJECT TO STATE TAXATION**

1. As we have said, and as the State concedes, there is nothing in the text or legislative history of the 1938 Act to suggest that Congress intended to permit States to tax the royalty income of Indian Tribes under leases that would be issued pursuant to that Act. Under the principles discussed in Point A (see pages 8-12, *supra*), that silence alone is a complete answer to the State's claim of a right to tax here, since only affirmative and clear congressional consent will suffice. Nor is there any reason to believe that Congress might have passed the 1938 Act on the mistaken premise that it was unnecessary to include in that Act an express provision consenting to the imposition of state taxes. To the contrary, the same Congress just a year earlier had enacted a law that explicitly confirmed in statutory form the establish rule that express consent is required.

In the Act of April 17, 1937, ch. 109, 50 Stat. 68 *et seq.*, Congress modified the tax provisions of the 1921 Act applicable to the Quapaw allottees in Oklahoma (see pages 14-15, *supra*) in order to limit the consent to tax in a number of respects. The 1937 Quapaw statute then further stated (*ibid.* (emphasis added)):

In accordance with the *uniform policy of the United States Government to hold the lands of the Quapaw Indians while restricted and the income therefrom free from State taxation of whatsoever nature, except as said immunity is expressly waived*, and in pursuance of said fixed policy, it is herein expressly provided that the waiver of tax immunity herein provided shall be in lieu of all other State taxes of whatsoever nature on said restricted lands or the income therefrom \* \* \*.

The legislative history shows that this language was intended to avoid any suggestion that restricted Indian land might be thought to be subject to state taxation unless Congress affirmatively granted an exemption. See *Quapaw Hearing, supra* note 14, at 7.

In light of this contemporaneous enactment expressing Congress's understanding of the applicable rule in statutory form, it is untenable to suppose that the same Congress—if it actually had intended a Tribe's royalty income under leases issued pursuant to the 1938 Act to be subject to state taxation—would have left that matter to a mere inference to be drawn from the terms of a prior statute (the proviso to the 1924 Act) that the 1938 Act otherwise superseded. Such an inference would be especially ironic and inappropriate here, because the 1921 Quapaw statute that Congress amended in 1937 to express its intent regarding the applicable rule was relied upon by Congress as one of the two precedents for the 1924 Act that the State invokes in this case. See page 17, *supra*. Moreover, even as regards the Quapaw Indians, Congress significantly restricted the scope of state taxing authority in 1937, by imposing a limit on the amount and type of tax and the minerals to which it applied. It therefore is difficult to believe that Congress at the same time intended to preserve after 1938 the far broader and open-ended grants of state taxing authority in the 1924 Act or its 1927 counterpart for Executive Order reservations.<sup>18</sup>

2. The suggestion that Congress intended to apply the taxing authority under prior law is in any event refuted by an examination of the text and structure of the 1938 Act itself. As the court of appeals held (Pet. App. 26-32, 43), and the State does not dispute, Congress intended that the 1938 Act would constitute a comprehensive scheme for leasing of unallotted lands and would supersede prior leasing statutes with regard to all leases issued after the effective date of the 1938 Act, except for the lands that are expressly ex-

<sup>18</sup> In 1927, Congress enacted a statute permitting the leasing of unallotted land on Executive Order reservations in accordance with the provisions of the 1924 Act. 25 U.S.C. 398a; see pages 2-3, *supra*. The express reference to the 1924 Act might well have been thought sufficient to apply the 1924 Act's taxing proviso to leases under the 1927 Act as well, but Congress nevertheless chose to include an express consent to state taxation under the 1927 Act. See 25 U.S.C. 398c. This further cautions against inferring a consent to state taxation where, as here, Congress has neither incorporated a taxing provision in the relevant statute nor referred to another statute that contains such a provision.

cluded under Section 6 of that Act, 25 U.S.C. 396f.<sup>19</sup> Thus, Section 1 prescribes what shall "hereafter" be permitted with regard to "unallotted lands within any Indian reservation" and other land owned by a Tribe, and Sections 1 and 2 together address all of the matters that were addressed by the substantive provisions of the 1924 Act that preceded its taxing proviso: the manner of bidding, the terms of leases, and the requirement of approval by the Tribe. Because the taxing authorization in the 1924 Act is merely a proviso to the substantive leasing provisions, the fact that the substantive features were entirely superseded with regard to leases issued under the 1938 Act strongly suggests that the taxing proviso appended to the substantive provisions likewise does not apply to such leases. See *United States v. McClure*, 305 U.S. 472, 477-478 (1939); *United States v. Marrow*, 266 U.S. 531, 535 (1925).<sup>20</sup>

This conclusion is all the more compelling because Section 1 of the 1938 Act paraphrases the 1924 Act in a number

<sup>19</sup> The excluded lands were "the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, [and] the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma." As we have explained (see pages 14-17, *supra*), the mineral lands of the Osage Tribe were covered by a different statute that contained an express authorization to tax the Tribe's royalty interest under oil and gas leases, and that express congressional consent to state taxation therefore survived the 1938 Act. So, too, did the special taxing authorization pertaining to the Quapaw Indians and the Indians of the Five Civilized Tribes in Oklahoma, which applied to allotted lands; the 1938 Act, of course, applies only to unallotted lands. The lands of the Papago Reservation were separately subject to mining under the public mining laws (see IRA, § 3, 48 Stat. 984), and a special statute also governed the leasing of the Crow Reservation (Act of June 4, 1920, ch. 224, § 6, 41 Stat. 753, as amended, ch. 403, 44 Stat. 659). The exceptions in Section 6 therefore demonstrate that Congress knew how to provide for the application of provisions of preexisting leasing laws to leases issued after the effective date of the 1938 Act when it wished to do so.

<sup>20</sup> The fact that the proviso was codified with the rest of the 1924 Act in a single section (see 25 U.S.C. (1928 ed.) 398), not in a separate section, underscores that the taxing proviso was integrally related to the substantive features on the 1924 Act and does not state an independent congressional consent to tax that could apply to leases issued after 1938.

of respects<sup>21</sup> and was obviously patterned after it, with appropriate modifications to account for intended changes in scope and substance. In these circumstances, the fact that Congress did not at the same time incorporate the taxing proviso to the 1924 Act is strongly indicative of a deliberate decision by Congress not to permit state taxation of tribal royalty interests under the 1938 Act.

3. The conclusion that the taxing proviso to the 1924 Act does not apply to the leases involved here also is strongly reinforced by the purposes of the 1938 Act. Those purposes were to establish uniformity in the leasing of tribal lands, to "give the Indians the greatest return from their property," and to "bring all mineral leasing matters in harmony with the Indian Reorganization Act." S. Rep. 985, 75th Cong., 1st Sess. 1-3 (1937); H.R. Rep. 1872, 75th Cong., 3d Sess. 1-3 (1938). See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 187 n.46 (Stevens, J., dissenting); Pet. App. 27-32.

a. The congressional goal of uniformity clearly would be disserved by a holding that the taxing provisions in prior statutes apply to leases under the 1938 Act. The prior taxing provisions varied considerably. Section 26 of the 1919 Act, for example, permitted state taxation only of the lessee's interests, not those of the Tribes, and that Act applied only in certain enumerated States, not to all reservations. 25 U.S.C. 399. See H.R. Rep. 1872, *supra*, at 1. The 1924 Act, which is applicable to reservations "bought and paid for," permits the State to tax the "production" of oil and gas or other minerals, including the Tribe's "royalty in-

<sup>21</sup> The 1924 Act provides that "unallotted lands on Indian reservations \* \* \* may be leased \* \* \* by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil and gas shall be found in paying quantities \* \* \*."

Section 1 of the 1938 Act provides that "unallotted lands within any Indian reservation \* \* \* may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

terests." 25 U.S.C. 398. By contrast, the 1927 Act, which applies to Executive Order reservations, permits taxation of the lessee's interest not only in production but also in improvements and other property. The 1927 Act also permits taxation not only of the Tribe's "royalties," as under the 1924 Act, but also "bonuses" and "rentals" received by the Tribe, which are not subject to state taxation under the 1924 Act.

The manner in which taxes levied against the Tribe's interests may be paid also differs in the 1924 and 1927 Acts. Under the 1924 Act, the Secretary is directed to "cause" the taxes to be paid, which permits him to provide for the lessee to pay to the State the tax due on the Tribe's share and then deduct the amount of that tax from the royalties it pays to the Tribe. However, the 1927 Act directs the Secretary to cause the taxes assessed against the Tribe's bonuses, rentals and royalties "to be paid out of tribal funds in the Treasury." See Pet. App. 255-257. For the foregoing reasons, there would be considerable disuniformity if the varying taxing provisions in prior statutes were found to be applicable to leases issued pursuant to the 1938 Act.

b. Recognition of a right in the States to apply their taxes to 1938 Act leases also clearly would conflict with the congressional purpose to "give the Indians the greatest return from their property," since any tax assessed against and deducted from the Tribe's royalty or other income obviously would reduce the net income realized by the Tribe. Compare *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 149. The effect could be felt not only with respect to the Tribe's receipt of royalties and other income as the beneficial owner of the land, but also in the curtailment of the Tribe's ability to exercise its inherent sovereign power to impose its own taxes on mining activities. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137-141, 158-159 n.26. The effect of the state tax could be quite severe in certain circumstances, as in the application to Indian lands of Montana's 30% coal severance tax that was in issue in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). If mining of a Tribe's coal is only marginally profitable, imposition of a state tax of that magnitude not only

could leave no margin for the Tribe to tax; it could prevent leasing or production altogether and thereby prevent the Tribe from receiving even its royalty income. See *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1113-1117 (9th Cir. 1981), modified, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982).

c. Finally, recognition of a right in the States to tax tribal income from mineral leases would be inconsistent with the purpose of the 1938 Act to "bring all mineral leasing matters into harmony with the Indian Reorganization Act." This is so in a variety of ways. Perhaps most significant is the fact that the statutes permitting state taxation of Indian income from mineral leasing were an integral aspect of the allotment policy. The allotment policy was repudiated by the Indian Reorganization Act, which accordingly removed the policy basis for permitting state taxation of the Tribe's royalty and other income from mineral leasing.

Under the General Allotment Act of 1887, the President was authorized to allot to each Indian residing on a reservation up to 80 acres of agricultural land or 160 acres of grazing land, and this land was to be held in trust by the United States, exempt from state taxation, for a period of 25 years or such longer period as the President might provide. Act of Feb. 8, 1887, ch. 119, §§ 1, 5, 24 Stat. 388, 389, 25 U.S.C. 331, 348. See *United States v. Mitchell*, 445 U.S. 535, 540-545 (1980). The Secretary of the Interior was further authorized by Section 5 of the Act to negotiate for the purchase of lands not allotted, which would then be disposed of to settlers, with the proceeds deposited in the Treasury for the benefit of the Tribe. It was intended that allotment would result in the break-up of reservations, the dissolution of tribal relations, and the assimilation of the individual Indians into the non-Indian community following a period of preparation during the time that their allotments were held in trust. See, e.g., *Draper v. United States*, 164 U.S. 240, 246 (1896); *Mattz v. Arnett*, 412 U.S. 481, 496 (1973); *Montana v. United States*, 450 U.S. 544, 559-560 n.9 (1981); *Solem v. Bartlett*, No. 82-1253 (Feb. 22, 1984), slip op. 3-5.

The proviso to Section 3 of the 1891 Act that permitted leasing for grazing or mining purposes of lands that are "not needed for farming or agricultural purposes, and are not desired for individual allotments," was part of an amendment to the General Allotment Act. Act of Feb. 28, 1891, ch. 383, 26 Stat. 794. It thereby made unallotted lands available for temporary use by non-Indians, perhaps as a prelude to a more permanent disposition of the lands to non-Indians and the assimilation of the Indians into the community at large. See *Felix S. Cohen's Handbook of Federal Indian Law* 134-135 (1982 ed.). During the period that the allotment policy was in force, these lands that had not actually been allotted, and at the same time had not yet been disposed of to settlers or ceded to the United States, had something of an intermediate status: they were still retained for the benefit of the Tribe, but destined, it presumably was thought, to pass eventually into non-Indian hands and into the full taxing and other jurisdiction of the State. It thus was perhaps inevitable that the States and their non-Indian residents would grow impatient that this process did not proceed more rapidly. Moreover, if oil, gas, and other minerals were taken from the unallotted lands while they remained in tribal hands, the result would be to deprive the State of the opportunity to tax that extraction in the manner it might have done if the reservation had been dissolved more rapidly. These forces led to the 1924 Act permitting state taxation of the production of minerals on unallotted lands of reservations bought and paid for, so that the revenue could be obtained and used by the State. See pages 16-17, *supra*.

At the same time, however, although Congress permitted the leasing of allotted lands for mining purposes, it did not enact a comparable consent to state taxation of such mining while the allotment remained in trust status. See pages 12-13, *supra*. This, of course, was consistent with the allotment policy of preserving the full value of the parcels that were intended to be retained for the Indians' benefit over the longer term. However, in Oklahoma, where tribal relations had been largely dissolved and the allotment process completed—and where the economic position

of the Indians permitted and the needs of the state and local governments required—Congress consented to taxation of mineral production even on some allotted lands as well as tribal lands that had been held subject to restrictions on alienation. See pages 13-18, *supra*.

"The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act" (*Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. at 479, quoting *Mattz v. Arnett*, 412 U.S. at 496 n.18a). In the IRA, Congress prohibited any further allotment of reservation lands (Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984, 25 U.S.C. 461), extended the existing period of trust or restrictions on alienation of any Indian lands until Congress otherwise directed (§ 2, 25 U.S.C. 462), and provided for the restoration of surplus lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)). The effect, of course, was to eliminate any expectation that unallotted reservation lands were destined to pass into non-Indian hands and state jurisdiction and thereby to remove the justification for the state to tax mineral production on the unallotted lands of the reservation. Indeed, the congressional intent to exempt lands from taxation is reflected in Section 5 of the IRA, 48 Stat. 985, 25 U.S.C. 465, which permits the Secretary to acquire land in the name of the United States in trust for the tribe or individual Indian and provides that such lands "shall be exempt from State and local taxation."

In light of this "intervening" legislative enactment[] (*Bryan v. Itasca County*, 426 U.S. at 386, quoting *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. at 479) repudiating the allotment policy and restoring full and enduring tribal interest in and control over unallotted reservation lands and resources, it was to be expected that when Congress revised the mineral leasing laws in 1938 to bring them into harmony with the IRA, it would decline to renew the prior authorization for the States to tax mineral production under leases of those unallotted lands. The effect was to restore unallotted lands to an equal footing with allotted lands insofar as state taxation of on-reservation Indian land and income was concerned, since mining under leases on allotted land had never been subject to state taxation.

A holding that the taxing proviso to the 1924 Act applied to the 1938 Act leases also would be inconsistent with the purposes of the IRA "to rehabilitate the Indian's economic life," and "to give the Indians the control of their own affairs and of their own property." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 152-153, quoting H.R. Rep. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (remarks of Sen. Wheeler). The income that a Tribe realizes through royalties from mineral leasing of unallotted lands and through the imposition of tribal taxes on mining is often used to maintain the tribal government and to furnish needed services to tribal members. This Court in *Merrion* viewed the Tribe's power to tax as an "essential instrument of self-government and territorial management" (455 U.S. at 139; see generally *id.* at 137-141). See also *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-157 (1980). The ability of a Tribe to obtain the needed financing could be seriously impeded if the States were permitted to siphon off revenues "derived from value generated on the reservation by activities involving the Tribes" (*Colville*, 447 U.S. at 156-157) and to devote those revenues to state purposes that do not affect the Tribes. See note 1, *supra*. When Congress permitted state taxation of mineral extraction on Indian reservation land in 1924 in order to help in the "upbuilding of the State" (65 Cong. Rec. 6844 (1924)), it did so based on the precedents in Oklahoma, where tribal governments were dissolved, reservations were broken up, and the state or local government provided a full range of governmental services to the Indians. Any expectation that Indians and reservations elsewhere would meet a similar fate and that the States would assume full responsibility for the Indians was dispelled by the IRA.

That Congress distinguished the Oklahoma Indians is apparent from the IRA itself, which expressly excluded a number of Oklahoma Tribes and their members from the provisions of the IRA that extended the restricted period of allotments, permitted the Secretary to establish new reservations, and authorized Tribes to organize by adopting constitutions and obtaining a charter for tribal corpora-

tions. § 13, 25 U.S.C. 473. See §§ 2, 7, 16, 17, 25 U.S.C. 462, 467, 476, 477. In 1936, Congress did enact a more limited IRA-type statute for Oklahoma—the Oklahoma Indian Welfare Act (Act of June 26, 1936, ch. 831, 49 Stat. 1967, 25 U.S.C. 501 *et seq.*)—which permitted Oklahoma tribes to organize and conferred other benefits. But significantly, unlike the IRA or the 1938 leasing Act that builds on the IRA, the Oklahoma statute expressly contemplates the continued application of Oklahoma taxes on the production of oil, gas and other minerals. Section 1 of the Oklahoma statute permits the Secretary to acquire lands for Indians and hold them in trust for the Indians concerned and provides that such lands shall be “free from any and all taxes.” 25 U.S.C. 501. To this extent, it direct parallels Section 5 of the IRA. But unlike the latter provision, Section 1 of the Oklahoma statute contains an exception permitting the State of Oklahoma to levy and collect a gross-production tax on all oil and gas produced from such acquired lands. *Ibid.* See also 25 U.S.C. 510. This is yet another indication that Congress did not contemplate that States other than Oklahoma would tax oil and gas production on unallotted tribal lands.<sup>22</sup>

In sum, even viewing the question of statutory construction in isolation, the court of appeals’ conclusion that the 1924 taxing proviso does not apply to leases issued pursuant to the 1938 Act “more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute.” *FBI v. Abramson*, 456 U.S. 615, 625 (1982). When the 1938 Act is read against the background of this Court’s de-

<sup>22</sup> The hearings in 1938 that addressed the loss of revenues to the States as a result of tax exemptions for Indian lands and mineral production on those lands, discussed by the State (Pet. Br. 36-37, 66), also focused exclusively on Oklahoma. See *Loss of Revenue—Tax Exempt Indian Lands: A Hearing on S. Res. 168 Before the Senate Comm. on Indian Affairs*, 75th Cong., 3d Sess. (1938). Those hearings in no way suggest that Congress intended when it enacted the 1938 Act to permit state taxation generally. If anything, these contemporaneous hearings would have brought home to Congress or the responsible committee the need to provide for such taxes in the 1938 Act if it had wished to allow such taxes.

cisions and the pattern of congressional action regarding state taxation of on-reservation Indian land and income derived from that land, the court of appeals’ conclusion is compelling.<sup>23</sup>

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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<sup>23</sup> As explained by the court of appeals (Pet. App. 45-47) and summarized above (see page 5, *supra*), there was no contemporaneous administrative interpretation of the 1938 Act that permitted state taxation of production under leases issued pursuant to the 1938 Act, and the administrative interpretation in several informal opinions in the mid-1950’s and 1966 were properly discounted, especially in light of the Department’s contrary view after formally reassessing the matter in 1977.